86-387

No. _____

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM 1986

HOWARD ELECTRICAL AND MECHANICAL, INCORPORATED,

Petitioner,

vs.

BAKER INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WM. ANDRESS, JR.
1313 Two Turtle Creek Village
Dallas, Texas 75219
Attorney for Petitioner

QUESTION PRESENTED

Whether the nullity of the Notice of Appeals provision of *Rule 4(a)(4)* of the Federal Rules of Appellate Procedure ("FRAP") is limited to the express situation of a request to alter or amend the judgment, or whether it is sufficiently broad to cover all requests for elaboration of attenuated and omitted findings under *Rule 60* of the Federal Rules of Civil Procedure ("FRCP").

After Judgment and Notice of Appeal Howard moved for "Additional Findings of Fact Which Were Not Included in Those Made by the Court at the Time of Its Decision," a *Rule 60* Motion, not seeking to alter or amend the Judgment. Contrary to the express language of the Motion, the Fifth Circuit construed it to be a Motion under *Rule 52* or *59*, FRCP, by presumption because it was filed within ten days, and invoked FRAP *4(a)(4)*, and dismissed the appeal for want of jurisdiction and overruled the Petition for Rehearing on 19 August 1986. The caption of this case contains the name of all interested parties.

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In The

Supreme Court of the United States

OCTOBER TERM 1986

HOWARD ELECTRICAL AND
MECHANICAL, INCORPORATED,

Petitioner,

vs.

BAKER INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered in the above entitled cause on July 18, 1986, with Petition for Rehearing overruled on August 19, 1986. The opinions of the Courts below are not officially reported.

GROUNDS OF JURISDICTION

The date of overruling the Petition for Rehearing of the order dismissing the cause for want of jurisdiction is 19 August 1986.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is *28 U.S.C. §1254(1)*, because of conflict

with prior decisions of this Court and of another Court of Appeals and *Rule 17.1(a)* and *(c)* of the Rules of The Supreme Court of the United States.

STATEMENT OF THE CASE

In a non-jury case based on diversity of citizenship between an electrical supplier, Baker, and an electrical sub-contractor, Howard, the Honorable Barefoot Sanders, District Judge in Dallas, rendered a judgment for Baker against Howard, and dictated Findings of Fact into the transcript of the testimony (Appendix, Page A-5). Howard filed Notice of appeal on 6 December 1985, and on the same day filed a Motion for Additional Findings of Fact on defensive matters raised by the pleadings but not included in the original Findings of Fact (App., Page A-11), which were subsequently refused as not supported. A supersedeas bond was filed, but no additional notice of appeal. The case was briefed by all parties with no question of jurisdiction raised. Subsequently by letter (App., Page A-14) the Court of appeals for the Fifth Circuit sua sponte raised the question of jurisdiction under FRAP *4(a)(4)* and the decision of this Court in *Griggs vs. Provident Consumer Discount Company* [1] and requested letter briefs from the parties which were furnished. The Fifth Circuit ruled that it had no jurisdiction under the nullity of appeal provisions in FRAP *4(a)(4)*, in an unpublished opinion (App., Page A-16) and Howard filed a Petition for Rehearing (App., Page A-21) which was overruled on 19 August 1986 (App., Page A-27).

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[1] 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d. 225

ARGUMENT

FRAP 4(a)(4) reads: "If a timely motion under the Federal Rules of Civil Procedure is filed in the District Court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

This Rule was amended in its present form in 1979.

Two things should be noted before our discussion begins: no mention is made of any motion under *Rule 60(a)* which had been in effect for thirty years at the time of the amendment of *FRAP 4(a)(4)*; and no motion was filed in the instant case seeking to alter or amend the judgment but only to supplement by additional findings matters omitted from the findings.

This Court upheld this language in FRAP *4(a)(4)* in *Griggs vs. Provident Consumer Discount Company*, in 1982. The opening paragraph of the *Griggs'* opinion says: "The petition for certiorari questions the validity of a notice of appeal filed after the entry of the district court's judgment but while the appellant's *motion to alter or amend* that judgment remained pending in the district court." According to this Court's opinion in *Griggs*, the nullity of appeal amendment was directed to a specific point of uncertainty and conflict, that is, whether the appellate court had the jurisdiction to change the judgment or whether the district court still had that power, and this Court

in a footnote referred to the recommendation of the Advisory Committee, that "it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from." Apparently the nullity provision was aimed at a definite pin-point of uncertainty, which we think this Court expressly recognized in its footnote 10 to its opinion in *Federal Communications Commission vs. League of Women Voters of California,* in 1984.[2] In that footnote of explanation of *Griggs*, which was not considered by the Fifth Circuit in the instant case, this Court said that "our decision in Griggs, however, rested squarely on the plain language of new Fed Rules App Proc 4(a)(4), which specifically provides that 'a notice of appeal filed before the disposition of a [Rule 59(e) motion] shall have no effect" and then went on to say, "at the same time, we emphasize that the rule requiring suspension of a jugement's finality for purposes of appeal during the pendency of a post-judgment motion for reconsideration applies only when such a motion actually seeks an 'alteration of the rights adjudicated' in the Court's first judgment," citing and following Department of Banking vs. Pink, and FTC vs. Minneapolis-Honeywell Company.

We think it clear that a reading of the problem which the amendment to FRAP 4(a)(4) sought to cure as outlined in the note of the Advisory Committee, and as discussed by this Court in *FCC vs. League of Women Voters,* and *Department of Banking vs. Pink,*[3] and *FTC vs. Minneapolis-Honeywell,*[4] without including a Rule 60(a) motion and without amending Rule 60(a) was intended to be a sharpshooter's aim at the peculiar

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[2] 468 U. S. , 104 S. Ct. 3106, 82 L. Ed. 2d. 278,287

[3] 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254

[4] 344 U.S. 206, 73 S. Ct. 245, 97 Law Ed. 245

problem and not a shotgun attack on all attempts to clarify and amplify omitted findings.

In *Department of Banking vs. Pink*, in a per curiam opinion this Court pointed out that "the motion did not seek a reargument or rehearing of any part of the case; . . . it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged." Nothing more was sought in that case than a clarification, just as here.

In *FTC vs. Minneapolis-Honeywell*, Chief Justice Vinson, speaking for the Court, said that "the memorandum was labeled neither as a petition for a rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief. . . . Thus, the mere fact that a judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

The Fifth Circuit relied strongly upon its prior opinion in *Harcon Barge Company vs. D & G Boat Rentals*,[5] which expressly stated at page 665 and 670, that the motions were to alter or amend under Rule 59(e), stating that the motion was one to rehear, reconsider, and amend the judgment, and upon rehearing refused to consider this Court's explanation of

[5] 784 Fed. 2d. 665, 670, Fifth Circ.

Griggs in FCC and the specific problem addressed by the amendment to FRAP 4(a)(4).

We submit that this was in error under the oft-repeated statements of this Court, mostly through Associate Justice Black. In *Hormel vs. Helvering,*[6] that "rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. An examination of the cases relied upon by Petitioner discloses that this Court, in following in some cases the general principle sought to be invoked here by Petitioner, has been careful to point out the circumstances justifying application of the practice in the particular case." Cf. *Hazel-Atlas Glass Company vs. Hartford-Empire Company,*[7] and the final sentence in Justice Black's dissent in *FTC vs. Minneapolis-Honeywell:* "Rules of practice and procedure should be used to promote the ends of justice, not to defeat them."

This, then, is a classic example of what the Ninth Circuit, in *Miller vs. Trans-American Press*[8], felicitously characterized as an attempt to memorialize a part of the decision which was not embodied in the Findings of Fact, and which that Court held to be clerical under *Rule 60.* As shown on Appellant's Brief in the Circuit Court, at page 5, the supplemental findings were requested merely upon those facets of the defense below which the Court did not cover, that is, whether the question of the

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[6] 312 U.S. 552, 85 L. Ed. 1037

[7] 322 U.S. 238, 88 L. Ed. 1250, 1256

[8] Ninth Circuit, 709 Fed. 2d. 24

unauthorized substitution of manufacturers for those required by the specifications, and the failure of Baker's testimony as to the reasonableness of its amounts spent for purported damages constituted defenses not covered in the judgment and the Court's findings.

CONCLUSION

Since this precise question has not been explored and covered by prior decisions of this Court, and there appears to be a definite misunderstanding by the lower courts of this Court's position, we submit that the clarification of the point requires the intercession of this Court, and the grant of the Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BAKER INDUSTRIES, INC.
Plaintiff,

vs.

HOWARD ELECTRICAL AND MECHANICAL INCORPORATED
Defendant.

Case No. CA-3-85-0839-H

FINAL JUDGMENT

On the 21st day of November, 1985, the above-styled and numbered cause came on for trial. The Plaintiff in such cause is Baker Industries, Inc. The Defendant is Howard Electrical and Mechanical Incorporated. All parties appeared by and with their attorneys of record and announced ready. The parties presented their opening statements, and then proceeded to adduce their evidence until the 22nd day of November, 1985, when all parties rested and closed their respective cases.

In the trial, Defendant urged its motion for a directed verdict at the close of Plaintiff's case. The Court denied such motion.

The Court, after considering the pleadings, the evidence, the motions and arguments of counsel, announced its Findings of Fact and Conclusions of Law on the record in open court on the 25th day of November, 1985, and is of the opinion that judgment should be rendered in accordance with its Findings of Fact and Conclusions of Law. It is, accordingly,

ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff Baker Industries, Inc. shall have and recover from and against Defendant Howard Electrical and Mechanical Incorporated the sum of SIXTY-EIGHT THOUSAND ONE HUNDRED EIGHTY-EIGHT AND NO/100 DOLLARS ($68,188.00), which sum constitutes damages for Plaintiff's lost profits caused by Defendant's breach of contract, together with post-judgment interest at the rate of 7.87% per annum from the date of this final judgment, until paid.

2. Plaintiff Baker Industries, Inc. shall have and recover from and against Defendant Howard Electrical and Mechanical Incorporated the additional sum of FORTY-TWO THOUSAND FIVE HUNDRED SIXTY AND NO/100 DOLLARS ($42,560.00), which sum constitutes the damages for Plaintiff's actual expenses incurred at the time of Defendant's breach of contract, together with post-judgment interest thereon at the rate of 7.87% per annum from the date of this final judgment, until paid.

3. Plaintiff Baker Industries, Inc. shall have and recover from and against Defendant Howard Electrical and Mechanical Incorporated the additional sum of TEN THOUSAND SEVEN HUNDRED SIXTY-TWO AND 50/100 DOLLARS ($10,762.50), which sum constitutes Plaintiff's reasonable attorneys' fees through trial, together with interest thereon at the rate of 7.87% per annum from the date of this final judgment, until paid; provided that, in the event an appeal to which the Plaintiff is a party is taken to the United States Court of Appeals for the Fifth Circuit, Plaintiff Baker Industries, Inc. shall have and recover from and against Defendant Howard Electrical and Mechanical, Incorporated an additional FIVE THOUSAND AND NO/100 DOLLARS

($5,000.00), together with interest thereon at the rate of 7.87% per annum from the date of this final judgment until paid; and provided further that, in the event that review is sought in the United States Supreme Court, Plaintiff Baker Industries, Inc. shall have and recover from and against Defendant Howard Electrical and Mechanicial, Incorporated an additional FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00), together with interest thereon at the rate of 7.87% per annum from the date of this final judgment until paid.

4. Defendant Howard Electrical and Mechanical Incorporated shall take nothing on its counterclaim against Plaintiff Baker Industries, Inc.

5. Plaintiff Baker Industries, Inc. shall have and recover from and against Defendant Howard Electrical and Mechanical Incorporated all costs of court in its behalf expended, together with post-judgment interest on such sums at the rate of 7.87% per annum from the date of this final judgment, until paid.

6. All relief not expressly granted herein is hereby denied.

SIGNED this 3rd day of December, 1985.

_____

U. S. District Judge

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following will be the Court's Findings of Fact and Conclusions of Law, dictated pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. I am reading from notes.

The case was tried before the Court without a jury on November 20 and 21, 1985. Following will be the Findings of Fact.

Baker, Plaintiff, is a Delaware corporation with its principal place of business in New Jersey. Pyrotronics, a manufacturer of fire alarm systems is a division of Baker.

Number Two: Howard Electrical, the Defendant, is a Colorado corporation having its principal place of business in Colorado.

Number Three: Keith Henrickson is the District Manager of Pyrotronics and has been employed with Pyrotronics for approximately five years. Paul Scott is a Pyrotronics salesman and was responsible for estimating the bid on the Denton County Jail project which is the project at issue in this lawsuit.

Number Four: Denzel Johnson is the Vice-President of Howard Electrical.

Number Five: On January 4, 1985, Pyrotronics and Howard signed a contract for the installation of fire protection and security equipment at the Denton County Jail. The amount, that is the price of the contract was $266,000.00.

Number Six: The contract, which was drafted by Howard, provides that Pyrotronics is to provide shop drawings to Howard within thirty days. The contract does not state when this thirty day period was to commence and the parties did not discuss the beginning date of the thirty day period.

Number Seven: A penalty provision for failure to meet the thirty day deadline was initially included in the contract but this provision was deleted by Henrickson with the approval of Johnson.

Number Eight: The contract also states that Pyrotronics was to begin all work within seven days after notification by Howard. Notification is not defined in the contract.

Number Nine: The contract does not state that time is of the essence or that it is subject to cancellation for failure to meet the deadline. Howard did not inform Pyrotronics by either word or conduct that the failure to meet the deadline would result in contract concellation.

Number Ten: On January 4, 1985, Paul Scott informed Denzel Johnson that Pyrotronics would have difficulty in meeting the thirty day deadline. Johnson stated that forty-five to sixty days would be satisfactory as long as it didn't take six months.

Number Eleven: Shortly after the contract was signed, Howard instructed Pyrotronics to refrain from beginning work on the project.

Number Twelve: A meeting between Johnson and Henrickson occurred on January 16 during which Johnson informed Henrickson that Chambers Electrical had submitted a bid of $216,800.00 for the same work for which the Baker-Howard contract had been entered into. Johnson requested that Henrickson for Pyrotronics voluntarily withdraw the bid. Hendrickson refused to do so.

Number Thirteen: On January 24, 1985, Pyrotronics received a signed Purchase Order from Howard. It is generally understood within the construction industry, and it was so understood by the parties here, that a signed Purchase Order constitutes a notice to proceed.

Number Fourteen: Pyrotronics did not submit shop drawings on February 4, 1985, the expiration of the thirty day period which is set out in the contract, depending upon its construction, and on February 5 Howard notified Pyrotronics that it was terminating the contract based on Pyrotronics' failure to provide shop drawings within the thirty day period.

Number Fifteen: On February 5th Howard entered into a contract with Chambers Electrical for a price of $216,800.00. That is what I previously referred to.

Number Sixteen: Plaintiff Baker's estimated project costs are $197,000.00. Plaintiff incurred costs of $42,560.00 prior to the February 5 termination.

The following are the Court's Conclusions of Law:

Number One: This Court has jurisdiction over the parties and the subject matter of the case.

Number Two: The Defendant Howard contends that Plaintiff failed to submit shop drawings within the requisite time period and that termination was a proper remedy for the failure as time was of the essence.

Number Three: The first question that must be considered by the Court is whether Pyrotronics failed to perform a contract requirement when it did not submit drawings by February 5, 1985. As I noted, the contract does not specify a date upon which the thirty day period was to commence. But the contract does require Pyrotronics to begin work within seven days of notification. Although the period could have started running on January 4, the date the contract was signed. It could also have begun on January 24, the date the signed Purchase Order was received since, as I have noted, an executed Purchase Order is commonly construed in the industry as the notice to proceed. Where a contract is ambiguous, the ambiguity will be construed against the party who drafted

the contract. Cases in support of that proposition are legion. I will refer for purposes of a citation to *Richland Plantation vs. Justiss Oil Company,* 671 F2nd 154, Fifth Circuit 1982.

Number Four: Even if the thirty day period expired on February 4, 1985, Plaintiff's failure to submit the drawings by that date does not constitute a breach of the contract. A party may waive compliance with a contract provision by its actions. See *Seismic and Digital Concepts vs. Digital Resources Corporation,* 590 S.W. 2nd 718, 721 out of the Texas Civil Appeals Court at Houston, 1979, no writ. Howard indicated by words and conduct that it would not require strict compliance with the provision at issue. Howard was aware that Pyrotronics expected difficulties in meeting the deadline and, in fact, had agreed to removal of the contract penalty provision, as I have noted. Johnson informed Scott that performance within forty-five to sixty days would be satisfactory. Furthermore, Johnson specifically instructed Henrickson to refrain from working on the project subsequent to the execution of the contract. This conduct evidences Howard's intent to waive the thirty day deadline.

Number Five: In any case, a party's failure to perform at a time provided for in a contract will not constitute a breach sufficient to warrant cancellation unless it is established that the parties intended time to be of the essence. The *Laredo Company, Inc. vs. H & H Meat Products,* 513 S.W. 2nd 210, 223, an n.r.e. case out of the Corpus Christi Court of Civil Appeals in 1974. The contract itself does not state that time was crucial. Note Plaintiff's Exhibit No. 11, the contract. Furthermore, Howard's instruction to refrain from working on the project, the lack of evidence indicating that Howard ever discussed the thirty day period with Pyrotronics and Howard's failure to return a signed Purchase Order until January 24 establish that the parties did not intend that time be of the essence. The

Court notes, moreover, that by changing subcontractors, Howard was forced to wait another thirty days before Chambers became obligated to submit shop drawings under Howard's construction. Such conduct is inconsistent with Howard's assertion that time was of the essence.

Number Six: Contract provisions which may result in termination are not favored by the law. Unless the contract clearly provides for termination upon non-performance, the Court will construe the required action as a covenant and not as a condition. There are a number of cases on that but note for example *Ogilvie v. Hill,* 563 S.W. 2nd, 846, 849, an n.r.e. case in 1978 from the Texarkana Court of Civil Appeals. The contract before the Court does not make any mention of termination for non-performance. Indeed, it initially provided for imposition of a financial penalty for non-performance until even that provision was deleted by agreement.

Number Seven: Accordingly, the Court is of the opinion that the Defendant breached the contract and that Plaintiff has been damaged as a result.

Number Eight: Recovery for breach of contract is measured by the difference between the contract price and the estimated cost of carrying out the contract. See *Deal vs. Amarillo Concrete,* 554 S.W. 2nd 294, 296, 1977, Waco Court of Civil Appeals, no writ. That is to say, Plaintiff's measure of damages in this case is the actual expenditures incurred plus anticipated profits.

Number Nine: The contract price as noted was $266,000.00. Pyrotronics' costs were based on estimates calculated by Mr. Paul Scott who was responsible for determining Pyrotronics' final bid on the project. Scott derived the bid price from material cost quotations given by various suppliers and added on an inflation factor where necessary to compensate for old quotations and he also relied on his own expertise, which seems

to be considerable, as a project cost estimator. The cost of the project was reasonably estimated to be, and the evidence supports the costs would have been had it gone through $197,812.00. See Plaintiff's Exhibit 29. So Plaintiff's lost profit was in the amount of $68,188.00, that being obviously the difference between the two hundred sixty-six thousand less $197,812.00.

Based on his own expertise in the fire and security alarm business, Henricson estimated Pyrotronics actually incurred costs at the time of the breach to be ten percent of the contract price plus a six percent salesman's commission the aggregate sum of $42,560.00 and the evidence before the Court amply supports this figure. These estimates of $68,188.00 and $42,560.00 are reasonable and as I say, are supported by the evidence before the Court.

Plaintiff is therefore entitled to an award for breach of contract of $110,748.00 plus reasonable attorney fees and costs of court.

Any finding in this may be deemed a conclusion and any conclusion may be deemed a finding.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed Dec. 6, 1985

BAKER INDUSTRIES, INC.

vs.

HOWARD ELECTRICAL AND
MECHANICAL INCORPORATED

No. CA-3-85-0839-H

DEFENDANT'S REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSION OF LAW

TO SAID HONORABLE COURT:

Defendant Howard Electrical and Mechanical Incorporated respectfully moves the Court to make the following additional findings of fact which were not included in those made by the Court at the time of its decision:

1. Wells-Fargo Electric Company, a subdivision of Baker Industries, Inc., made a bid for the identical work included in the contract in question of $251,000 in August of 1984, at the time of the original bidding for the job.

2. Howard used the Wells-Fargo bid as the basis for its bid on the electrical subcontract.

3. The original bids on the Denton County Jail were thrown out through no fault of the parties hereto, and bids requested again in December of 1984.

4. Before re-submitting an identical bid, Howard inquired of Wells-Fargo whether its bid was still good and whether it would stand by it and was advised that it would do so.

5. After Howard again was notified that it was receiving the electrical subcontract, Wells-Fargo advised Howard that it was not prepared to stand by its bid, and suggested that Howard contract with Pyrotronics.

6. At the time of the re-bidding in December, Howard had furnished to both Wells-Fargo and Pyrotronics an unexecuted complete purchase order, in the same terms as the ultimately executed purchase order, completely detailing the work to be done.

7. There were approximately 50 crafts involved in the construction of the Denton County jail project, and there was tight scheduling of performance outlined and required by the general contractor.

8. The specifications on the job called for certain named manufacturers of products and provided that there could be no substitution except by 7 days advance notice and approval by the general contractor.

9. In its cost estimate for damages Pyrotronics substituted manufacturers not listed in the specifications, without approval, including its own manufacture.

10. There was no evidence of the money spent by Pyrotronics up to the date of cancellation.

11. Denzel Johnson's purported statement that 30 days was not important for furnishing shop drawings, so long as they did not take six months, if it was made, was made contemporaneously with the signing of the contract, and as a verbal statement was merged into the written contract.

12. Any of the foregoing findings, whether of law or of fact, shall be construed appropriately.

Wherefore Defendant prays the Court to make the above additional findings.

WM. ANDRESS AND
ASSOCIATES, P. C.

By: WM. ANDRESS, JR.
Wm. Andress, Jr.
State Bar No. 1238000
1313 Two Turtle Creek Village
Dallas, Texas 75219
522-9340

A copy of the foregoing Request for Additional Findings of Fact and Conclusions of Law have been mailed to Mr. Richard V. Normington of Johnson & Swanson, 100 Founders Square, 900 Jackson Street, Dallas, Texas 75202-4499, Attorney for Plaintiff, on December 5th, 1985, by United States mail.

By: WM. ANDRESS, JR.
Attorney for Defendant

UNITED STATES COURT APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

May 28, 1986

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Dallas, TX 75206

No. 85-1758 — Baker Industries, Inc. vs. Howard Electrical & Mechanical, Inc.

Dear Counsel:

This is to confirm my telephone advice of today that the Court has requested that the parties answer the following question in letter-brief form, same to be filed with this office by not later than June 6, 1986.

The record in the instant case indicates that:

December 3, 1985 — Judgment entered by the district court.

December 6, 1985 — Motion to amend findings of fact and conclusions of law filed.

December 6, 1985 — Notice of Appeal filed.

December 27, 1985 — Supersedeas bond filed.

January 10, 1986 — District court denies motion to amend findings of fact and conclusions of law.

No further Notice of Appeal filed.

Messrs. William Andress, Jr.
and Richard V. Normington May 29, 1986

Fed. R. App. P. 4 provides the following:

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Given the above facts and rule of appellate procedure, why should the instant appeal not be dismissed for lack of appellate jurisdiction? The parties' research should include, but by no means be limited to, the Supreme Court's discussion in Griggs v. Provident Consumer Discount Co., 459 U. S. 56, 103 S. Ct. 400, 74 L.Ed.2d 225 (1982).

Very truly yours,

GILBERT F. GANUCHEAU
CLERK

By RICHARD E. WINDHORST, JR.
Richard E. Windhorst, Jr.
Chief Deputy Clerk

REW, Jr.:gc

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BAKER INDUSTRIES, INC.,
Plaintiff-Appellee,

v.

HOWARD ELECTRICAL AND MECHANICAL INCORPORATED,
Defendant-Appellant.

No. 85-1758
Summary Calendar
OPINION

Filed July 18, 1986

Before: Alvin B. Rubin, Sam D. Johnson, and Edith H. Jones, Circuit Judges.

Opinion by Judge Sam D. Johnson

Appeal from the United States District Court
for the Northern District of Texas
Barefoot Sanders, District Judge, Presiding

SUMMARY

Jurisdiction/Appeals

Following the entry of final judgment in the district court, defendant filed a motion for additional findings of fact. On the same date, defendant filed a notice of appeal. The motion for additional findings of fact was subsequently denied.

[1] The Federal Rules provide that when a motion of additional findings of fact is made, the time for appeal runs from the entry of the order on the motion. It further provides that a notice of appeal filed before the disposition of the motion shall have no effect. It is well established that failure to file a timely notice of appeal is mandatory and jurisdictional, and absent compliance, the appeal must be dismissed. [2] Here, the notice of appeal filed before the disposition of the motion

was not merely defective, it was a nullity. The court lacks the power to waive the defect of such a premature notice of appeal.

OPINION

SAM D. JOHNSON, Circuit Judge:

We are constrained to dismiss the instant appeal since defendant-appellant, Howard Electrical and Mechanical, Inc. ("Howard Electrical"), has failed to file an effective notice of appeal under Fed. R. App. P. 4(a)(4). For purposes of determining jurisdiction,[1] the following procedural sequence is relevant:

> December 3, 1985 — final judgment entered by the district court.
>
> December 6, 1985 — defendant Howard Electrical filed its motion for additional findings of fact.[2]
>
> December 6, 1985 — notice of appeal filed by defendant Howard Electrical.

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[1] No party filed a motion to dismiss this appeal. However, it is axiomatic that this Court must raise *sua sponte* the issue of its own jurisdiction. Accordingly, upon noticing the possible jurisdictional defect, this Court asked the parties to submit letter briefs on the issue. The parties complied.

[2] The certificate of service indicates that the motion was served on December 5. A motion to amend or make additions to the district court's findings of fact must be "made" within ten days of the district court's entry of judgment. Fed. R. Civ. P. 52(b). A Rule 52(b) motion is deemed to be "made" when it is served. 5A Moore's Federal Practice ¶ 52.11[1], at 52-193 n.8(1986). The Rule 52(b) motion was clearly made within ten days of the district court's entry of judgment.

> January 10, 1986 — district court denied defendant Howard Electrical's motion for additional findings of fact.

Subsequent to January 10, 1986, no further notice of appeal was filed. Indeed, the last document in the record is the district court's denial of the request for additional findings of fact.

[1] Federal Rules of Appellate Procedure 4(a)(4) provides in relevant part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Fed. R. App. P. 4(a)(4). It is well established that the failure to file a timely notice of appeal under Fed. R. App. P. 4(a) is "mandatory and jurisdictional, and absent compliance, the appeal must be dismissed." *Burnside v. Eastern Airlines, Inc.*, 519 F.2d 1127, 1128 n.2 (5th Cir. 1975) (per curiam). This Court has recently emphasized that a "bright-line" approach in administering Rule 4 serves the interest of both counsel and the Court. *See Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 670 (5th Cir. 1986) (en banc).

[2] Howard Electrical's postjudgment motion, which was captioned "Defendant's Request for Additional Findings of Fact and Conclusions of Law," is a motion under Rule 52(b) of the Federal Rules of Civil Procedure. In the instant case, Howard Electrical filed its notice of appeal one day after its motion (i.e., the motion for additional findings of fact) under Rule 52(b) was served. Rule 4(a)(4) clearly provides, "A notice of appeal filed before the disposition of any of the above motions shall have no effect," Thus, the notice of appeal, filed before the disposition of Howard Electrical's motion, "is not merely defective; it is a nullity." 5A *Moore's Federal Practice* ¶ 52.11[3], at 52-200 (1986). Moreover, this Court lacks the power to waive the defect of such a premature notice of appeal. *Id.* (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d. 225 (1982) (per curiam)). *See also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2582, at 724-25 (1971 & 1986 Supp.).

In response to the Court's inquiry, Howard Electrical argues that its motion "was addressed to mere matters of form" and did not seek an alteration of the district court's judgment against it. While we would note some difficulty in accepting Howard Electrical's characterization of its motion,[3] Howard Electrical's argument in any event would have this Court ignore the working of the rule that the motion suspends the finality of the judgment "whether or not an alteration of the judgment would be required if the motion is granted." Fed. R. App. P. 4(a)(4). Accordingly, we must reject Howard Electrical's attempt to recharacterize its motion in order to avoid the terms of Rule 4. *See Harcon Barge*, 784 F2d at 667 (timely filed

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[3] The motion clearly appears as a motion to the district court to "make additonal findings." Fed. R. Civ. P. 52(b). Moreover, the motion requests the addition of three pages of additional fact findings.

motion under Rule 59(e) cannot be characterized as Rule 60 motion in order to avoid effect of Fed. R. App. P. 4(a)(4)).

Accordingly, appellant Howard Electrical has failed to file an effective notice of appeal. This Court has no jurisdiction.

APPEAL DISMISSED.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HOWARD ELECTRICAL AND MECHANICAL, INCORPORATED, *Appellant* *vs.* BAKER INDUSTRIES, INC., *Appellee*	No. 85-1758

APPELLANT'S PETITION FOR REHEARING

Wm. Andress and Associates, P.C.
1313 Two Turtle Creek Village
Dallas, Texas 75219

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HOWARD ELECTRICAL AND MECHANICAL, INCORPORATED, *Appellant*	No. 85-1758
vs.	
BAKER INDUSTRIES, INC., *Appellee*	

APPELLANT'S PETITION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Appellant Howard Electrical and Mechanical, Incorporated, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, files herewith its Petition for Rehearing of the order and opinion of this Court filed July 18, 1986, dismissing the appeal, and as grounds therefor would respectfully show the Court the following points of law and fact which in the opinion of this Appellant the Court has overlooked or misapprehended.

While the Court's time table set forth in its opinion is correct, the Motion for Additional Findings clearly states in its opening paragraph that it asks the Court to make "the following additional findings of fact which were not included in those made by the Court at the time of its decision." There is no attempt to alter or amend those findings theretofore made, nor to rehear, reconsider, or amend those findings as is specifically set forth in the opening paragraphs and on page 670 of this Court's decision in *Harcon Barge Company vs. D & G Boat Rentals, Inc.*, 784 Federal 2d. 665, 670. There is nothing in the Appellant's motion to indicate in any fashion that it was intended to be a motion under Rule 59, but everything in

connection with the motion shows clearly that it was intended to be a motion under Rule 60 of the Federal Rules of Civil Procedure. It was clearly an attempt to memorialize part of the decision, which the Ninth Circuit held to be clerical under Rule 60, in *Miller vs. Trans-American Press,* 709 Fed. 2d. 524.

We fully recognize the right of this Court to raise the issue of its own jurisdiction *sua sponte,* but there is nothing to trigger *sua sponte* in this record other than the fact of counsel's diligence in filing the motion within ten days after the entry of the judgment, which would be required under *Rule 59* but is completely discretionary under *Rule 60.* It rather galls counsel that after 57 years of practising law and 53 years since his admission to the Bar of the United States Supreme Court, during which he has built a reputation for careful and diligent practise as several members of this Court are aware from his frequent appearances before them on the District Bench, that his client should be the victim of an unfounded presumption based upon the prompt filing, and directly contrary to what he expressed in the motion itself. This case has already been briefed, and it is clear from the Appellant's Brief that the additional findings were requested only upon those facets of its defense below which the Court did not cover, as shown on page 5 of the Appellant's Brief.

We would further call to the Court's attention that neither in its opinion in this case nor in its opinion in *Harcon Barge Company* did this Court pay any attention at all to the gloss or explanation of *Griggs vs. Provident Consumer Discount Company,* 459 U. S. 56, 103 Supreme Court 400, 74 Law Ed. 2d. 225, made by the Supreme Court of the United States in *Federal Communications Commission vs. League of Women Voters of California,* 468 U. S. , 104 Supreme Court 3106, 82 Law Ed. 2d. 278 at 287, in an explanatory footnote No.

10 to that opinion. In that footnote Justice Brennan, speaking for a substantial majority said:

> "We have emphasized that the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a post-judgment motion for reconsideration applies only when such a motion actually seeks an 'alteration of the rights adjudicated' in the Court's first judgment. Department of Banking vs. Pink, 317 U. S. 264, 266, 87 L. Ed. 254, 63 S. Court 233 (1942) (per curiam); see also FTC vs. Minneapolis-Honeywell Co. 344 U. S. 206, 211, 97 L. Ed. 245, 73 S. Court 245 (1952). (mere fact that a judgment previously entered is reentered or revised in an immaterial way dost not toll the time within which review must be sought')."

Both of those cases cited in the footnote above point out that the test is whether the attempt is to disturb or revise legal rights and obligations which had been plainly and properly settled, and Justice Black's final statement in the dissent is consonant with the position of the Supreme court in that footnote: "Rules of practice and procedure should be used to promote the ends of justice, not to defeat them."

This decision penalizes the Appellant for counsel's diligence and is not within the cited scope of *Griggs,* but is within the footnote explaining what *Griggs* means.

We therefore respectfully urge the Court to set aside the order of dismissal and to permit this cause to be decided upon its merits.

Respectfully submitted,

WM. ANDRESS AND
ASSOCIATES, P. C.

By:
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CERTIFICATE OF SERVICE

I certify that two true and correct copies of the Appellant's Petition for Rehearing have been mailed by United States mail, postage prepaid, to Mr. Richard V. Normington of Johnson & Swanson, 100 Founders Square, 900 Jackson Street, Dallas, Texas 75202-4499, Attorney for Appellee, concurrently with its mailing of the required copies to the Clerk of this Court.

_____

Attorney for Appellant

July 29, 1986

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1758

Filed August 19, 1986

BAKER INDUSTRIES, INC.,
Plaintiff-Appellee,

versus

HOWARD ELECTRICAL AND MECHANICAL, INC.,
Defendant-Appellant.

Appeal From The United States District Court
For The Northern District of Texas

ON PETITION FOR REHEARING

August 19, 1986

Before RUBIN, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

SAM JOHNSON
United States Circuit Judge